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RECORD
AND
BRIEF

In The
Supreme Court of the United States

STATE OF TEXAS,

Plaintiff,

v.

STATE OF NEW MEXICO
and STATE OF COLORADO,

Defendants.

On Exceptions To The First Interim Report of the Special Master

STATE OF COLORADO'S EXCEPTIONS TO THE FIRST INTERIM REPORT OF THE SPECIAL MASTER

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JURISDICTION

The State of Texas invoked the Court's original jurisdiction under Article III, Section 2 of the United States Constitution and 28 U.S.C. §1251(a).

STATEMENT OF THE CASE

This case involves a dispute between States that are parties to the Río Grande Compact, ch. 155, 53 Stat. 785 (1939); Colo. Rev. Stat. §37-66-101 ("Río Grande Compact" or "Compact"). The Compact apportions the waters of the Río Grande above Fort Quitman, Texas among the three signatory States – Colorado, New Mexico, and Texas. Texas invoked the Court's original jurisdiction to determine whether New Mexico violated the terms of the Compact. Texas also named Colorado as a defendant because it is a signatory to the Compact. Texas stated no claims against Colorado. The United States has been permitted to intervene to protect federal interests implicated by this litigation.

At this preliminary stage, the Court is asked to determine a number of threshold issues. First, it is asked to determine whether to dismiss Texas' complaint. Second, it is also asked to determine whether additional parties, which are neither signatories to the Compact nor otherwise subject to the Court's exclusive original jurisdiction, should be allowed to intervene. These non-Compact entities seeking intervention include two irrigation districts, Elephant Butte Irrigation District ("Elephant Butte District") in New Mexico, and El Paso

County Water Improvement District No. 1 ("El Paso District") in Texas. Through water delivery contracts with the United States, the districts are obligated to manage water deliveries from the Río Grande Project, which is operated by the United States Bureau of Reclamation. Third, the Court is asked to decide whether and to what extent the United States' separate claims against New Mexico should be considered or dismissed in this Compact related proceeding.

Because of the early stage of this litigation, the case is not yet at issue. No parties have filed answers, counter claims, or cross claims. Discovery has not started. The only issues before the Court are the motions to dismiss and to intervene.

The First Interim Report of the Special Master ("Report") recommends the following: deny the motion to dismiss Texas' complaint, grant the motion to dismiss the Río Grande Compact claims of the United States, accept non-exclusive jurisdiction over the non-Compact claims by the United States, and deny the requests for intervention of both Elephant Butte District and El Paso District. Colorado does not take exception to these general recommendations. Specifically, Colorado does not object to the recommendation to deny the motion to dismiss Texas' complaint or to deny intervention of Elephant Butte District and El Paso District. Colorado also does not take exception to the recommendation to dismiss the Río Grande Compact claims asserted by the United States. Likewise, Colorado does not dispute the recommendation to allow the United States to participate; however, contrary to the Report,

the Court should not accept jurisdiction over the United States' federal reclamation law claims. Instead, the Court should allow only the claims of the United States regarding its interests in implementing the Convention between the United States and Mexico for the Equitable Distribution of the Waters of the Río Grande for Irrigation Purposes, May 21, 1906, U.S.-Mex. 34 Stat. 2953 ("1906 Convention").

In addition to these recommendations, the Report includes a historical account of the region's irrigation development and negotiation of the Río Grande Compact based on independent investigations by the Special Master. For terms not expressly stated in the Compact, the Report relies on this material to draw conclusions regarding Compact implementation, allocations, and obligations. The Report recognizes, however, that conclusions and findings based on this independent investigation were neither necessary nor considered when reaching the ultimate recommendations contained therein. Colorado therefore requests that the Court affirmatively abstain from adopting the Report's extraneous findings and conclusions as the law of the case until the parties have had an opportunity to introduce and explain the entirety of materials that may be considered relevant to the ultimate disposition of this case.

SUMMARY OF ARGUMENT

This brief addresses only those matters in the Report to which Colorado takes exception. This brief therefore makes two arguments.

First, the Court should limit the claims of the United States to those based on the 1906 Convention. This original action is about the Río Grande Compact and the water apportioned among the signatory States. Resolution of the Compact dispute among the States will address the United States' allegations regarding its reclamation contracts that largely mirror those of Texas about the Compact. The Court should not expand the scope of the case to entertain separate contract claims which would also require the other contracting parties to participate.

Second, when ruling on the Report's ultimate recommendations, the Court should affirmatively abstain from adopting the Report's findings and conclusions about the history of the Río Grande basin and interpretation of various provisions of the Compact. Many of the Report's findings and conclusions were also based on materials not submitted by the parties. Accordingly, the Report indicates that much of the material is not dispositive to its ultimate recommendations. This case, moreover, is not even at issue. The parties should have an opportunity to file responsive pleadings, conduct discovery, present evidence, and make arguments before the many topics in the Report become the law of the case. Otherwise, the parties could be prejudiced by premature statements, based on

incomplete information, that may define the States' rights and obligations under the Compact.

ARGUMENT

I. The Court should limit claims by the United States to its interests in the 1906 Convention with Mexico.

Colorado does not take exception to the Report insofar as it recommends that the United States should be allowed to move forward with claims based on the 1906 Convention. Report at 236. The Río Grande Compact states that it does not affect the United States' obligation to Mexico under existing treaties; therefore, resolution of Texas' Compact claims cannot, as a legal matter, dictate a resolution to allegations regarding the 1906 Convention. See, Río Grande Compact, Art. XVI. Thus, consideration of the United States' claims based on the 1906 Convention is necessary.

However, Colorado takes exception to the Report to the extent it recommends allowing the United States to bring other claims that are not based on the 1906 Convention. Those other claims are based on contracts among the Bureau of Reclamation, Elephant Butte District, and El Paso District for water delivery from the Río Grande Project and are nearly identical to Texas' claims and more properly resolved under the rubric of the Compact by the States.

The Río Grande Project includes reservoirs in New Mexico used to store and deliver water to Elephant Butte District and El Paso District. As the Report explains, the United States' claims will be addressed by litigation among the States.

> The resolution of the 1938 Compact claims made by Texas and the federal reclamation law claim made by the United States involve the same parties, discovery of the same facts, and examination of similar, if not identical, issues.

Report at 234 (Feb. 9, 2017).

* * *

> [B]oth Texas and the United States allege that the misappropriations of water by New Mexico through her agents and citizens affect and diminish the 1938 Compact's apportionment of water to Texas and, possibly, to Mexico.

Report at 236. The federal reclamation law allegations of the United States deal primarily with effectuating its delivery contracts from the Río Grande Project. United States Complaint at 4 ("New Mexico has allowed the diversion of surface water and the pumping of groundwater that is hydrologically connected to the Río Grande downstream of Elephant Butte Reservoir by water users who either do not have contracts with the Secretary [of the Interior] or are using water in excess of contractual amounts."). Texas' allegations deal with the same subject matter within the context of the

Compact: "New Mexico's actions have reduced Texas' water supplies and the apportionment of water it is entitled to from the Río Grande Project and under the Río Grande Compact." Texas Complaint at 9.

Importantly, it is the States, and not the United States, that represent the water users, including water from the Río Grande Project, under the Compact. The States are parties to the Compact, which apportioned the water among them:

> The state of Colorado, the state of New Mexico, and the state of Texas, desiring to remove all causes of the present and future controversy among these states and between citizens of one of these states and citizens of another state with respect to the use of the waters of the Rio Grande above Fort Quitman, Texas, and being moved by considerations of interstate comity, and for the purpose of effecting an equitable apportionment of such waters, have resolved to conclude a compact for the attainment of these purposes. . . .

Río Grande Compact, preamble; see also, Río Grande Compact, Art. I(c) (defining Río Grande basin as all the territory drained by the Río Grande and its tributaries in Colorado, New Mexico, and Texas above Fort Quitman). The States represent the water users within their respective borders. Report at 259, 275; *Nebraska v. Wyoming*, 325 U.S. 589, 629 (1945). The water users within each State make use of water available within the Compact apportionment. "The United States has no claim itself to the natural flow of an interstate

stream, as does a State through which the stream passes." Report at 230. See also, *Nebraska v. Wyoming*, 295 U.S. 40, 43 (1935) ("[The Secretary of the Interior's] rights can rise no higher than those of Wyoming, and an adjudication of [Wyoming's] rights will necessarily bind him."). Therefore resolution of water allocations among New Mexico and Texas in the region below Elephant Butte Reservoir will address the same issues alleged by the United States.

If the United States' contract claims cannot be resolved through the States' Compact litigation, then those claims are sufficiently different and should not be added to this case. First, it would add disputes that are not at issue. "[E]quitable apportionment of the Rio Grande has already been achieved through the States and Congress's ratification of the 1938 Compact." Report at 258. "[T]he contracts between the state water improvement districts and the United States for the management of the Project are not at issue here. Rather, this case centers squarely on the interpretation of the 1938 Compact as to the rights and duties of the sovereign signatory States under the Compact." Report at 272. See also, *Nebraska v. Wyoming*, 515 U.S. 1, 20-21 (1995) (allowing a Wyoming claim against the United States not as a contract dispute but based on claimed injury to its equitable apportionment of the North Platte River). In addition, including the United States' claims may risk allowing the United States to take a position contradictory to the signatory States regarding Río Grande Compact obligations, undermining the positions of the actual parties to the Compact.

Further, including the United States' claims may require the Court to add the very parties to which the Report recommends denying intervention because Elephant Butte District and El Paso District are also parties to the Río Grande Project contracts. This would greatly expand the scope of litigation and go against the Report's recommendation to not allow intervention of the irrigation districts. Also, resolving the Compact dispute first would allow the United States and the other contracting parties, Elephant Butte District and El Paso District, to then resolve their water delivery disputes within the parameters of the Río Grande Compact's apportionment. Because the boundaries of each of the irrigation districts sit entirely in either New Mexico or Texas, any contracted delivery of water from the Río Grande Project must be consistent with how the Compact apportions water among the States. *Hinderlider v. La Plata and Cherry Creek Ditch Co.*, 304 U.S. 92, 106-108 (1938).

II. The parties should have the opportunity to conduct discovery, present evidence, and make arguments on the issues before the Court accepts the findings and conclusions in the Report as the law of the case.

The Report admittedly contains findings and conclusions beyond what was necessary to resolve the motions. Those findings and conclusions are based upon independent investigation by the Special Master and do not rely upon evidence submitted by the parties. The Court should refrain from adopting such findings

and conclusions of the Report until the parties have the opportunity to conduct discovery, present evidence, and make arguments on those issues.

The Report confirms that it contains extraneous material: "[T]his report and recommendation recounts the relevant legislative and negotiating history in order to give the Compact context. However, nothing detailed herein should be construed as fact finding violative of Fed. R. Civ. P. 12, as nothing in the historical record was dispositive regarding the ultimate recommendations of the report," and "[N]o need exists to rely upon the history of the 1938 Compact to interpret that language." Report at 193, 203. Colorado agrees that those findings and conclusions are not necessary to resolve the issues currently before the Court. At this stage, the only issues to resolve include whether Texas or the United States has failed to state a claim, and whether the irrigation districts should be allowed to intervene. Statements about the development of irrigation in the West, origins and evaluation of the prior appropriation system, the history of the Compact and its negotiation, the intentions of the States, and the overall allocation scheme of the Compact are not necessary to resolve the motions. Accordingly, the Court need not, and should not, accept these findings and conclusions in the Report in order to rule on its ultimate recommendations. See, Report at 193, 203.

Colorado is not asserting that it necessarily disagrees with the type of findings and conclusions in the Report. Rather, in light of the nascent stage of the proceedings and undeveloped nature of the issues, the

State simply cannot determine whether and to what extent it may take issue with such determinations at this time. By acknowledging that the contents of the Report are not presently adopted as the law of the case, the Court gives the parties an opportunity to develop the case, conduct discovery, and present evidence that may inform the ultimate conclusions relevant to the issues that arise. This, in turn, may help provide information needed for the Special Master to eventually draft future recommendations regarding these issues, should they be necessary.

Colorado asks the Court to affirmatively abstain from adopting the findings and conclusions of the Report in order to avoid the potential for any prejudice that may otherwise be created by accepting the entirety of the Report at this stage in the litigation. Many of the materials used to support statements in the Report were gathered independently, and some may remain unknown to the parties. Colorado likewise has not yet had the opportunity to conduct discovery or present its own evidence on many issues discussed in the Report.

The relevance of this request is not limited to the specifics of this case. Accepting reports with extensive independent preliminary evaluations could also prejudice parties in future original actions. With a case not yet fully developed through pleadings, discovery, presentation of evidence, and argument, extensive findings and conclusions developed through independent investigation present the possibility of unknown risks to parties. Accepting a report as law of the case

on issues not required for resolution may unintentionally bind parties on issues not before the Court. It may also create future disputes if a report makes statements regarding accepted practices about which a special master is unaware.

In addition, if an entire compact is subject to evaluation and resolution before the case becomes at issue, then the pleadings would not serve to frame the dispute. *Nebraska v. Wyoming*, 515 U.S. 1, 8 (1995) (explaining that, especially in an original action, the pleadings serve to limit the scope of a dispute under the Court's exclusive jurisdiction). This could increase the number of issues presented in a suit, force States to make an entire compact the subject of a suit regardless of the extent of existing disputes, and argue the entire case at the first available opportunity. Such an approach prevents developing a case through discovery and limiting a suit to actually disputed issues.

Allowing the parties to conduct discovery and present evidence on the issues relevant to this case, and accepting the Report only for its ultimate recommendations, will allow the Court to resolve the outstanding motions without being hamstrung by premature determinations or causing prejudice to the parties.

CONCLUSION

The Court should: (1) limit the claims of the United States to those regarding the 1906 Convention and (2) state that it is not adopting the findings and conclusions within the Report as the law of the case.

Respectfully submitted,

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